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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,
Appellant,
against
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, ET AL.,
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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Interest of American Civil Liberties Union

This brief is filed with consent of the parties. The American Civil Liberties Union is a nonprofit, nonpartisan organization having a nationwide membership of persons of all religious views and sects including citizens of New Jersey. It is devoted to the preservation and protection of the fundamental liberties guaranteed citizens of this country by Federal and State constitutions. It believes in the historic, basic American doctrine of separation of church and state and that only by its steadfast and

strict observance can the religious freedom of all the people be assured.

We wish it clearly understood that in filing this brief, we do not, expressly or by implication, attack or criticize the principles or practices of any religious organization or disparage parochial or private schools for those whose consciences or preferences prompt them to use such means for the education of their children. We respect the convictions of those who believe it desirable that a school which combines secular and religious instruction is best adapted to the proper development of their children.

What we say here we would repeat with equal emphasis in respect of schools or institutions of any religious denomination or sect.

Our sole concern is with the constitutionality of the appropriation of public moneys for transportation of children to private, sectarian schools.

Statement of the Case

The facts are simple, undisputed. Appellee Board of Education of Ewing Township, New Jersey, in September, 1942, adopted a resolution providing for "transportation of pupils of Ewing to the Trenton and Pennington High and Trenton Catholic Schools by way of public carriers as in recent years". It agreed to pay, for that current school year, the cost of transportation to such Catholic parochial schools. Part of the agreed sum was paid, the balance remaining unpaid because of this suit. Transportation was by public carrier buses. The Board reimbursed Township parents for bus fares, between that township and Trenton, paid by their children attending the four Trenton Catholic parochial schools. These schools, located outside of the Ewing school district, were maintained by

the parish and parents, religion was taught there, and a Catholic priest was school superintendent.

The Board's resolution was based on a New Jersey statute (Rev. Stat. 18:14-8, as amended by Chap. 191, N. J. Laws of 1941) which provides:

> "18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of children to and from school other than a public school, except such school as is operated for profit in whole or in part.*
>
> *When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.*" (Italics ours.)

The amendments of 1941 changed "the schoolhouse" to "any schoolhouse", and added the italicized matter.

On application of appellant, resident and taxpayer of Ewing Township, a writ of certiorari was issued by the New Jersey Supreme Court to review the legality of the resolution. Appellant urged the resolution and statute were illegal as violating various provisions of the New Jersey Constitution (Art. I, Pars. 3, 4, 19, 20, and Art. IV, Sec. 7, Par. 6), and the Fourteenth Amendment of the Federal Constitution.

The New Jersey Supreme Court (one Justice dissenting) set aside the resolution, holding it violated Art. IV,

Sec. 7, Par. 6 of the State Constitution providing that the fund for the support of free schools may be appropriated only to the support of public free schools and not for any other purpose under any pretense (132 N. J. L. 98; R. pp. 34-41).

On appeal, the New Jersey Court of Errors and Appeals reversed and dismissed the writ on the ground the resolution and statute did not contravene the State or Federal Constitutions. Three judges dissented (133 N. J. L. 350; R. pp. 45-62). That Court denied reargument, but allowed this appeal (R. pp. 63, 65).

Appellant assigns as error that the resolution and statute contravene the Fourteenth Amendment in authorizing the gift and use of public funds in aid of private and sectarian schools and the taking of private property for a private purpose or private persons and constitute legislation respecting the establishment of religion and authorizing support of religious tenets by taxation (R. pp. 64-65).

POINT I

The statute and resolution are violative of the Federal constitutional guarantees respecting religious freedom and the fundamental doctrine of separation of church and state inherent therein.

We respectfully submit that the use of public moneys to transport children attending parochial schools is in aid and support of such schools and of religious institutions and tenets, and that the statute and resolution authorizing such expenditures violate the fundamental American principle of separation of church and state and the constitutional prohibition respecting the establishment of religion.

The First Amendment of the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law". The First is made applicable to the States through the due process clause of the Fourteenth. The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. The Fourteenth has rendered the states and their agencies as incompetent as Congress to enact laws regarding religion prohibited by the First. (See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Palko* v. *Connecticut*, 302 U. S. 319, 324.)

Boards of education, as well as States, must observe these constitutional limitations. In the *Barnette* case, *supra*, at page 639, this Court (in overruling *Minersville District* v. *Gobitis*, 310 U. S. 586), said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. * * *
>
> Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less

> vigilant in calling it to account. . . . There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

This Court does not have to become "the school board for the country" to insist that local school boards and school legislation conform to constitutional limitations. No mere issue of "educational policy" is involved here. Moreover this Court will not, in matters of public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed. (Cf. *Gobitis* case, *supra*, at p. 598; *Barnette* case, *supra*, at pp. 637, 640, 642.)

In weighing arguments of the parties here, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. For the due process test, it is enough for a state to have a "rational basis" for adopting restrictive legislation. But the freedoms of religion, which are in a preferred position, may not be infringed on such slender grounds. While it is the Fourteenth which bears directly upon the States, it is the more specific limiting principles of the First that we believe should finally govern this case. (*Barnette* case, *supra*, at p. 639; *Murdock* case, *supra*, at p. 115.)

In this brief we are dealing with the Fourteenth merely as the transmitting instrument.

As we shall show, the use of public funds to transport sectarian school children is in support of the school and of the religion and religious tenets fostered and taught there. The purpose of the First Amendment, seen in the perspective of history, is clear enough. It was designed to bring about the complete separation of church and state. In the *Barnette* case, *supra* (at p. 655), Mr. Justice Frankfurter referred to this "doctrine of church and state, so cardinal in the history of this nation and for the liberty of our people". This separation was to be achieved by guaranteeing to every person freedom from state interference in his religious beliefs and practices and by preventing the state from lending its aid, support or influence to any religion or religious establishment. No longer were religious institutions to be supported out of the public treasury.

The task of translating the majestic guarantees of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century is not difficult in this case, because the problems of today, involved here, were fully known and experienced in essentially similar manifestations in the eighteenth century and long before, and had led, after a century-and-a-half struggle for religious freedom and the separation of church and state, to the framing and adoption of the First Amendment. The embodiment of these great principles in the new State and Federal constitutions was simply writing colonial experience into the fundamental law of the land. So clearly was this grand purpose etched in history that in 1942 a Justice of this Court

confidently could state (*Barnette* case, *supra*, at pp. 653, 654):

> "The great leaders of the American Revolution *were determined to remove political support from every religious establishment.* • • •
>
> The prohibition against any religious establishment by the government placed denominations on an equal footing—*it assured freedom from support by the government to any mode of worship* and the freedom of individuals to support any mode of worship. • • •
>
> The essence of the religious freedom guaranteed by our Constitution is therefore this: *no religion shall either receive the state's support* or incur its hostility. Religion is outside the sphere of political government." (Italics ours.)

And this Court definitely could state in *Davis* v. *Beason*, 133 U. S. 333, 342:

> "The first amendment to the Constitution, in declaring that *Congress shall make no law respecting the establishment of religion*, or forbidding the free exercise thereof, *was intended* • • • *to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.*" (Italics ours.)

That separation of church and state is a fundamental American principle is manifest from history.

Before the adoption of the Constitution, attempts were made in some colonies and States to legislate not only in respect of the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. For instance, Mary-

land gave its legislature power to "lay a general and equal tax for the support of the Christian religion."; and Massachusetts and New Hampshire empowered their legislatures to raise public moneys "for the support and maintenance of public Protestant teachers of piety, religion and morality". Punishments were prescribed for a failure to attend upon public worship and sometimes for entertaining heretical opinions.

The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia, when we declared our independence. The Episcopal Church had been the established church in that colony. The Presbytery of Hanover, as soon as independence had been declared, and on October 24, 1776, presented a memorial to the general assembly of Virginia asking the abolition of the establishment, which had involved, among other things, the payment of state funds to Episcopal clergy. In their memorial they pointed out what they deemed to be the proper function of government and declared that they were desirous of no state aid in religious affairs. They said "We ask no ecclesiastical establishment for ourselves nor can we approve of them and grant it to others" and they entreated:

> "• • • that all laws now in force in this commonwealth which countenance religious domination may be speedily repealed—that all of every religious sect may be protected in the full exercise of their modes of worship and exempted of all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice or voluntary obligation."

The Baptists and Quakers joined the Presbyterians in opposing the establishment of the Episcopal church, with

the result that the latter was disestablished. A motion was put before the Assembly, however, to levy a tax for the support of not only the Episcopalian but all denominations. The Presbytery of Hanover, Virginia, again presented a remonstrance in which they stated:

> "As it is contrary to our principles and interest and, as we think, subversive to religious liberty, we do again most earnestly entreat that our Legislature would never extend any assessment for religious purposes to us or to the congregations under our care."

The proposed measure was defeated in 1779, but it appeared again in 1784, when the House of Delegates had under consideration a "bill establishing provision for teachers of the Christian religion." This bill would have allowed every person to pay his money to his own denomination, or if he did not wish to help support any denomination, his money would go to the maintenance of a school in the country. Action on this bill was postponed until the next session to enable the legislature to obtain expressions of opinion on it from the people. This brought out a determined opposition. Thereupon Madison wrote and circulated his famous pamphlet "A Memorial and Remonstrance" in which he demonstrated "that religion, or the duty we owe the Creator" was not within the cognizance of civil government, and made the following statement, which is as applicable today as it was then, however innocent the intrusion of religion into matters pertaining to the State may seem to be:

> "It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians,* in exclusion of all other sects? that the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Italics ours.)

At the next session, the proposed bill was not only defeated, but there was passed in its stead, on December 16, 1785, an "Act for establishing religious freedom" (Statute of Religious Freedom), written by Thomas Jefferson, which is a declaration of religious independence applicable to all situations growing out of a union of state with religion or to any project which would involve such union. The preamble thereto said, among other things:

> "* * * that to compel a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable opportunity of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness * * *."

The statute itself in part provided:

> "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, * * *."

About a year after the passage of that statute, the convention met which prepared the United States Constitution. Jefferson, away in France, expressed disappointment in a letter that the proposed draft contained no provision for religious freedom. A number of states thereafter proposed amendments, including a declaration of religious freedom. At the first session of the first Congress, the amendment now under consideration was proposed with others by Madison and was adopted. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to speak of the First Amendment as "thus building a wall of separation between church and State." (For the foregoing, see *Reynolds* v. *United States*, 98 U. S. 145, 162-164; *"The Legal Status of Church-State Relationships in the United States"*, by Dean Alvin W. Johnson, pp. 90-95 (Univ. Minn. Press, 1934), and authorities there cited; *"Religion in Colonial America"* by William Warren Sweet (1942 Scribner's), especially Chap. X, *"America and Religious Liberty"*, pp. 319-339; *"Jefferson Himself"*, by Bernard Mayo, Houghton Mifflin Co., 1942, pp. 75, 79-84, 86-87. "American Charters, Constitutions and Organic Laws," F. N. Thorpe, Vol. 3, p. 1689, Maryland Constitution of 1776, Art. XXXIII; Vol. 3, pp. 1889-90, Mass. Constitution of 1780, Art. III; Vol. 4, p. 2454, New Hampshire Constitution of 1784, Art. I, Sec. VI.)

A careful examination of the American Federal and State constitutions, in light of the historical background, discloses that nothing is more firmly set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty and to guard against the slightest approach toward its infringement. They perceived that a union of Church and State, like that

which existed in England and other countries, was certainly opposed to the spirit of our institutions. (See Cooley's *"Constitutional Limitations"*, Vol. II, 8th Ed. (1927), p. 960; Johnson's *"The Legal Status of Church-State Relationships in the United States"*, *supra*, at p. 285.) As pointed out in Cooley's work at pages 966-7, there are certain things which are not lawful under any of the American constitutions, including the following:

> "1. *Any law respecting an establishment of religion.* • • • There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.
>
> 2. *Compulsory support, by taxation or otherwise, of religious instruction.* Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it." (Italics ours.)

In light of our constitutional history, it was not difficult for Mr. Justice Frankfurter, in the *Barnette* case, *supra*, at page 600, to foresee arising in this Court the very issue involved in this case. He said:

> "• • • Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. • • • What of the claim that if the right to send children to privately maintained schools is partly an exercise

> of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? *What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?*
>
> These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population." (Italics ours.)

The principle of separation of church and state carried over into the field of education. The same spirit that had manifested itself in opposition to state control or support of religion directly likewise bred opposition to state support of sectarian schools. If education was to be religious, it must be carried on by the churches and without the support of the state. With the demand for an educational system supported by the state came a similar demand that such education be nonsectarian. (See Johnson, *"The Legal Status of Church-State Relationships in the United States", supra,* at pp. 15-22, 152.) This principle was recognized by this Court in the *Barnette* case, *supra,* at page 637, where it was stated:

> "* * * Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."

Courts have been quick to perceive that using public funds to transport or otherwise aid sectarian school children invokes and violates this concept of separation of church and state. Mr. Justice Frankfurter diagnosed the issue in the *Barnette* case, *supra,* at page 660.

In the leading case of *Judd* v. *Board of Education*, 278 N. Y. 200, the New York Court of Appeals, in declaring a statute void and unconstitutional which authorized the use of public funds to pay for the transportation of pupils attending private parochial schools, stated:

> "* * * While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. In conformity with that concept, education in State supported schools must be non-partisan and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. While education is compulsory in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools (*Pierce* v. *Society of Sisters*, 268 U. S. 510), but their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern. As Judge Pound aptly said in *People ex rel. Lewis* v. *Graves* (245 N. Y. 195, 198), 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.' We furnish free common schools suitable for all children of the State regardless of social

status, station in life, race, creed, color or religious faith."

"Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law." (Italics author's.)

* * *

"It is claimed that the statute may be sustained as a valid exercise by the Legislature of the police power of the State. This argument overlooks the consideration that even the police power must be exercised in harmony with the restrictions imposed in the fundamental law." (citing cases)

Judd v. *Board of Education,* 278 N. Y. 200, 210, 211, 215.

In the very recent case of *Gurney* v. *Ferguson,* 190 Okla. 254; rehearing denied; cert. den. 317 U. S. 588, 707, the Supreme Court of Oklahoma, in holding invalid and unconstitutional a statute authorizing an expenditure of public moneys to transport pupils to private parochial schools, said in this connection, at page 256:

"The brief for plaintiffs in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and all their institutions to function and operate under church control exclusively. We agree. In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regula-

tion and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

In *Knowlton* v. *Baumhover*, 182 Iowa 691, at pp. 704, 705, the Court, in restraining school officials from paying out public school funds in aid of a parochial school, stated in an excellent opinion reviewing the authorities:

> "*If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state*, and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.
>
> * * *
>
> * * * To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding * * * all use or appropriation of public funds in support of sectarian institutions." (Italics ours.)

See also the able dissenting opinion in *Board of Education* v. *Wheat*, 174 Md. 314, 325 (a case involving transportation of parochial school children); *Harfst* v. *Hoegen*, 349 Mo. 808, rehearing denied; *Williams* v. *Board of Education*, 173 Ky. 708.

POINT II

The appropriation through statute or resolution of public funds for transportation of parochial school pupils is in aid and support of such schools and of the religion and religious tenets taught there, and constitutes state support of religion in violation of the said Constitutional provisions.

There can be no question that parochial schools generally and Catholic parochial schools in particular are private, religious, sectarian schools and institutions. They are not public schools or part of the public school system. It is recognized that parochial schools are instituted by the Catholic Church so that the youth thereof may receive instruction in its religious principles and beliefs along with secular education. Systematic religious instruction and moral training according to the tenets of that Church are regularly provided. The schools are supported and maintained by the local church parish and diocese. Invariably, the teachers are members of an order. Religious worship, as well as religious instruction, is involved. (See *Smith* v. *Donahue*, 202 App. Div. (N. Y.) 656; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 532; *Board of Education* v. *Wheat, supra; Gurney* v. *Ferguson, supra;* 17 Enc. Brit., page 336: "Parochial Schools".) That secular subjects are also taught there does not change their character. As said in *Knowlton* v. *Baumhover, supra,* at page 706:

> "• • • At the bar of the court, every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching. To

> constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching."

The schools benefited here are four such Catholic parochial schools. As Justice Case (now Chief Justice) said below (R. 62):

> "The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents." (133 N. J. L. 350, 367)

Such schools clearly are religious institutions. They are quite different from a private secular hospital corporation which happens to be operated by individuals of a particular religious group (cf. *Bradfield* v. *Roberts*, 175 U. S. 291).

It is equally clear that the furnishing of transportation to children attending private parochial schools out of public moneys is in aid and support of such schools.

The majority, and better-reasoned, view of the courts of this country is that the private and sectarian schools are the beneficiaries of expenditures made out of public funds for the transportation of their pupils. That view is ably and typically expressed in the leading case of *Judd* v. *Board of Education, supra*, 278 N. Y. 200, 211, 212, where the New York Court of Appeals in a similar case stated:

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. • • •

Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (*State ex rel. Traub* v. *Brown*, 36 Del. 181, 187, writ of error dismissed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

To the same effect see *Gurney* v. *Ferguson*, 190 Okla. 254, *supra; State ex rel. Traub* v. *Brown*, 36 Del. 181, writ of error dismissed, 39 Del. 187; *Mitchell* v. *Consolidated School District*, 17 Wash. 2nd, 61; *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469; *State ex rel. Van Straten* v. *Milquet*, 180 Wisc. 109, which latter case was recently approved in *Costigan* v. *Hall*, 23 N. W. 2nd, 495 (Wisc. Sup. Ct. 1946). See also, Report of Minnesota Attorney General, 1920, page 300, which ruled that "to expend school funds for such purpose (transporting parochial school children in public school buses) would mean, upon a final analysis," • • • "the expenditure of public funds in aid of the support and maintenance of a private school wherein doctrines and creeds of a particular religious sect are promulgated and taught. This the law does not permit." In this connection, Johnson,

in his scholarly work *"The Legal Status of Church-State Relationships in the United States", supra,* states at pages 188-9:

> "The position here taken may be said to be consistent with our general public school policy and the American principles of separation of church and state. It may be difficult for some to see why their children going to a private or parochial school should be denied transportation in the public school bus which passes their doors, and for whose support they are taxed. This denial is, however, the only course that may be rightfully pursued. The matter of transportation is one of the privileges that accompanies attendance at a public school, and it is only as the children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would directly or indirectly constitute an appropriation of public funds for private or sectarian purposes, and would thus ignore the fundamental purpose of our educational system as set forth in our constitutional and statutory laws."

In several states there has been evolved the theory that such transportation is for the benefit of the child, not the school. (See *Board of Education* v. *Wheat,* 174 Md. 314, *supra* (three Justices dissenting); *Adams* v. *St. Mary's County,* 180 Md. 550; *Bowker* v. *Baker,* 167 Pac. 2nd, 256; 73 Ad. Cal. App. Rep. 727; (4th Dist. Ct. of App. Calif.). In *Nichols* v. *Henry,* 191 S. W. 2nd, 930 (Ky.), the Kentucky Supreme Court expressly reaffirmed its ruling in the *Sherrard* case, *supra,* that public school funds could not be used for the transportation of children attending private schools, but held that a general tax levied for that purpose would be legal.

This "child benefit" theory seems first to have received judicial recognition in *1929* in the "lending text-book" cases of *Borden* v. *Louisiana State Board of Education* and *Cochran* v. *Same*, 168 La. Rep. 1005, 1030, decided simultaneously by a divided court of four to three. That case was followed in *Chance* v. *Mississippi*, 190 Miss. 453, another "lending text-book" case. The able dissenting opinion in the *Borden-Cochran* cases characterized this ruling of the majority as "a mere begging of the question" and as "an attempt to do indirectly that which cannot be done directly". In *Chance* v. *Mississippi*, the dissenting opinion, after citing the authorities and the State and Federal constitutions, including the First Amendment, stated:

> "Both the Federal and the State constitutions sought in unmistakable terms to provide for a complete separation of church and state. * * * The statute involved is a step in the direction of breaking down that separation."

The minority opinion in the *Cochran-Borden* cases was said by the New York Court of Appeals in *Judd* v. *Board of Education, supra,* to be the "better reasoned opinion". In the *Sherrard* and *Gurney* cases, *supra,* the Kentucky and Oklahoma Supreme Courts said that these Louisiana cases and a few others of similar import, were not only contrary to the great weight of authority but "were lacking in persuasive reasoning and logic". In *State ex rel. Traub* v. *Brown, supra,* the Delaware Court, apropos the *Borden-Cochran* decisions, said "We are not impressed by the reasoning of this case. There was a strong dissenting opinion". Compare *Synod of Dakota* v. *State*, 2 S. D. 366, 374, where as early as 1891 a similar argu-

ment (that tuition aided the state or students and not the school) was rejected with this comment:

> "This contention * * * is, we think, unsound, and leads to absurd results. The theory contended for by counsel would, in effect, render nugatory the provisions of the constitution * * * *This theory carried out to its legitimate results, would enable any one leading sect to control the schools, institutions and funds of the state, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the constitution.*" (Italics ours.)

See also, *Smith* v. *Donahue*, 202 App. Div. 656 (N. Y.), approved by the New York Court of Appeals in the *Judd* case, *supra*, for a complete answer to the views of the *Cochran* case majority.

There is much justification for the observation of Justice Case below (R. p. 57) that "It is the consensus of the weight of judicial opinion that the 'child-benefit theory' is an ingenious effort to escape constitutional limitations rather than a sound construction of their content and purpose."

The "child-benefit" theory is not only unsound and devious, but it is extremely dangerous because it provides a ready excuse for all sorts of violations of basic principle. There is no limit or logic to the extent of its application. There is and can be no rational or clear line of demarcation in this field between what constitutes aid to a school as distinguished from aid to a pupil. For example, in the instant case, the provision is for transportation of children by public carrier buses and reimbursement of fares paid to the parents out of public funds. In other

cases legislation, going a step further, has provided for pupils of private sectarian schools to use, at public expense, in conjunction with public school children, the buses owned and operated by a public school district, along or near public school routes, thereby necessitating additional expenditures for more bus routes and buses. (See *Gurney* v. *Ferguson, supra; State ex rel. Van Straten* v. *Milquet, supra; Board of Education* v. *Wheat, supra; Mitchell* v. *Consolidated School District, supra; Bowker* v. *State, supra.*) By still another step, public funds are appropriated in large sums to supply buses *solely* and *especially* for private, parochial school children—with no transportation being provided for public school children in the same county (*Adams* v. *St. Mary's, supra*). It is to be noted that while the *Adams* case was based on the earlier, split *Wheat* decision, the majority in the *Wheat* case had justified its decision on the ground that "*no buses are to be provided for private school children especially.*" Thus it is seen how the process develops from small, indirect aid to direct and large expenditures for the especial and exclusive use of parochial school children, and the *Adams* and *Wheat* cases show how easily the transition can be made and justified once the principle is blurred.

Already, as seen, it has been urged, and occasionally held, in various cases that the use of public funds for transportation, text books and school supplies is justified as in aid of the pupil, not the school. Obviously, the "child-benefit" theory is equally applicable to and may next be urged in support of every proper expenditure for school purposes, such as free lunches, tuition, salaries of teachers, furnishings and equipment, repairs and improvements and even construction of school houses. "Indirect" aid will soon give way to "direct" aid. (See the *Judd*

case, *supra*, at p. 212.) This dangerous trend has been pointed out in various cases and articles. For instance, in the dissenting opinion of *Board of Education* v. *Wheat*, *supra*, at pp. 340, 341, it was said:

> "In a certain sense, the child is a beneficiary, as he is of everything which contributes to his ability to go to school and there to receive an education. However, the existence of the private school is the indispensable prerequisite. Without it, his sectarian education at school cannot be had; nor would any problem of transportation or of accessibility arise. Thus whatever educational benefits are received by the pupil proceed from the school as the primary source to the child. The sectarian school is in competition with the public free school, and cannot maintain its position without sufficient funds. • • • Any apt means for relieving the sectarian school of providing transportation for its pupils at the immemediate charge against public funds is as direct and substantial a donation to the sectarian school, as if the moneys thus appropriated by statute had been paid into the treasury of the school. The device of providing a bus for the common carriage of public and sectarian school children or a bus for their separate carriage cannot affect this conclusion. State *v.* Milquet, 180 Wis. 109, 192 N. W. 392. An appropriation which would be unlawful by direct action may not be lawfully accomplished by indirection. If so, circumvention would attain a new use. There are other purposes and objects more necessary in sectarian schools than the carriage of their pupils, and the theory advanced would permit public funds to be used to pay either for the athletic supplies and equipment of pupils; or for the fuel bill to keep the school room adequately heated; or for the payment of salaries of instructors; or for musical instru-

ments, encyclopedias, laboratory equipment; or for a fund to cover the traveling expenses of the children in their athletic contests. It is submitted that the use of general taxation for these illustrative purposes is neither reasonably nor logically permissible on the theory that the appropriation is not in aid of sectarian schools, but for the benefit of their pupils. * * * Transportation to and from a school is an important factor in securing and keeping pupils. It is obviously an aid."

See also *Gurney* v. *Ferguson, supra.* Dissenting opinion of Justice Case below (R. p. 55); and note in 25 Illinois Law Review 547.

These extensions are not mere far-fetched possibilities. Past experience has indicated their reality. In a number of cases the courts have been asked to uphold appropriations out of the public treasury to sectarian schools and institutions for purposes other than pupil transportation. The use of public funds to pay directly or indirectly the tuition fees of pupils in private or sectarian schools has been sought, but not permitted. See *Otken* v. *Lamkin,* 56 Miss. 758; *Synod of Dakota* v. *State,* 2 S. D. 366, *supra; Williams* v. *Board of Trustees,* 173 Ky. 708, *supra; Rutgers College* v. *Morgan,* 70 N. J. L. 460; Opinion of the Justices, 214 Mass. 599, cf. *Judd* v. *Board of Education,* 278 N. Y. 200, 215, *supra;* so also, for text books and school supplies, *Smith* v. *Donahue, supra, Haas* v. *Independent School District No. 1,* 9 N. W. 2nd, 707 (S. D.); so also, sums of money or financial aid generally, *Council of Newark* v. *Bd. of Ed. of Newark,* 30 N. J. L. 374; *Connell* v. *Gray,* 33 Okla. 591; *State of Nev.* v. *Hallock,* 16 Nev. 373; *Bennett* v. *City of La Grange,* 153 Ga. 428; *Constitutional Defense League* v. *Waters,* 308 Pa. 150; *People* v. *Bd. of Ed. of*

Brooklyn, 13 Barb. (N. Y.) 400; *A., T. & S. F. Rld. Co.* v. *City of Atchison*, 47 Kans. 712.[1]

The extremities to which school boards may go in the direction of breaching the historic wall of separation between church and state is illustrated by *Harfst* v. *Hoegen*, *supra*. There a parish parochial school was taken into the public school system by a local school board, and was thereafter supported by public funds. While the text books and courses of study were prescribed by the state, the children were marched to the church next door for a religious service each day and in school were given sectarian religious instruction. Religious symbols and pictures were in the rooms and the teachers were members of a religious order. In restraining such use of public funds, the Court said that the nominal supervision by the school board was but an indirect means of accomplishing that which the Constitution forbade, and it stated further (at p. 817):

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[1] Appellees' reference to three recent Federal Acts calls for brief comment.

1. The National Free Lunch Act (Act of June 4, 1946, c. 281, 60 Stat. 42 U. S. C. §§1751-1760) authorizes the disbursement of Federal funds through the states or other agencies or (where local laws prohibit this) directly by the Secretary of Agriculture to non-profit private schools (as well as public schools) for lunch room equipment and supplies and for serving lunches free or at reduced cost to pupils. The problems raised by this statute would require careful scrutiny. We do not believe that questions as to its constitutionality need be anticipated by the decision in the case at bar.

2. The District of Columbia Act providing and fixing a reduced fare of three cents for all school children not over eighteen years old on street railway and bus lines to and from schools in the District (Dist. Col. Code, 1940, §§44-214) is in the same category as the Act providing for the free transportation on such lines of policemen and firemen, (*id.* §§44-216). It is merely a matter of rate fixing. No use of or reimbursement out of public funds is involved.

3. The Serviceman's Readjustment Act of 1944 (Chap. 268, Pub. L. 346, 38 U. S. C. §701, Pub. L. 689) is a war measure of limited time duration involving grants to or for the benefit of World War II veterans for vocational and educational aid for their rehabilitation and readjustment in civilian life. More specifically it is for those veterans whose education was impeded, delayed, interrupted or interfered with by reason of entrance into service. Thereunder the veteran is free to enter any educational institution he chooses, public or private, sectarian or non-sectarian. It does not seem to us that this Act violates the First Amendment in respect to religious freedom.

> "Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. If the management of this school were approved, we might next have some other school gaining control of a school board and have its pastors and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none."

Another illustration is in *Knowlton* v. *Baumhover, supra.* There a public school board, in a town peopled largely by Catholic families, sold the public school house as inadequate and rented for public school purposes part of the parochial school house adjoining the church. The instruction given was an admixture of secular and religious teaching. The Court restrained the public school officials from contributing public school funds for the support of this school. See also *Wright* v. *School Dist.*, 151 Kan. 485, where large sums from school taxes were used to supply, equip and maintain a parochial school; *State ex rel. Public School District* v. *Taylor,* 122 Neb. 454; and annotations, 141 A.L.R. 1148 and 5 A.L.R. 879.

In *"The Relation of Religion to Civil Government in the United States"* (Putnam's Sons, 1895), the author, Cornelison, stated at pages 345-346:

> "The fostering of any particular Christian sect, by making appropriations to it from the public treasury, is a wrong so obvious as to need no special consideration. • • •
>
> The public sentiment against making appropriations from the public treasury to any Christian sect upon any pretense whatsoever, whether of promoting

> education or charity, is so widespread and firmly established and the conditions in which such appropriations can be obtained are so unlikely to occur and so repugnant to the feelings of personal independence that no other safeguard is thought to be necessary to prevent the wrong."

The efforts outlined in the cases cited and in statutes recently enacted in some states show that, contrary to the author's expectation that self-restraint would be an adequate safeguard, vigorous application of constitutional principles is necessary to assure continued separation.

By means of the "child benefit" theory, aid to private, sectarian schools out of public funds has been justified by proponents of such aid and by some courts as (1) an incident and in aid of the compulsory education laws,* (2) a valid exercise of the police power in aid of the health, safety and general welfare of the children, including prevention of traffic hazards, (3) a means to give parochial school children the equal rights, benefits and privileges to which it is said they are "entitled". One or more of these theories have been advanced and fully answered in the various school transportation and textbook cases mentioned above. Whether such purposes are stated in the statutes authorizing such aid or are implied by the courts in upholding such aid, they are merely rationalizations and devices to avoid constitutional limitations.

In other cases, such, for example, as this one (R. pp. 50-51) and the Kentucky *Sherrard* and *Nichols* cases, *supra*, such aid is judicially approved by drawing fine distinc-

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* Compare this argument with that made by the appellees in *Pierce* v. *Society of Sisters*, *supra*, where it was urged, and held that state compulsory education laws could not interfere with the right to conduct and send children to sectarian schools.

tions in respect of the source of the public moneys used. These distinctions are without substance. We believe the constitutional principle applies whatever the immediate source of such public moneys. When the Federal and State constitutions were framed, it was well understood that they were intended to prevent *any* aid, direct or indirect, out of the public treasury to sectarian schools. The basic constitutional principle ought not be frittered away by ingenious refinements.

POINT III

The decision of this Court in the *Cochran* case should not be considered as controlling in this case.

Appellee argued below that the decision of this Court in *Cochran* v. *Board of Education*, 281 U. S. 370, disposes of all appellants' assignments of error. The decision therein of the Louisiana Court (168 La. 1005, 1030) has been noted above. That Court was divided four to three. The fallacious reasoning of the majority has been exposed since many times. This Court's decision appears to have been based on the Louisiana Court's interpretation of the state statute.

It does not appear that this Court considered the consequences of applying the test by the First Amendment, transmitted by the Fourteenth, as it must now do under its recent decisions. As Mr. Justice Reed has pointed out in the *Murdock* case, *supra*, (at p. 126), it is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment

from impairment by the State and until then these liberties were not deemed to be guarded from state action by the federal constitution. Particularly, as to the freedoms of religion, this recognition did not become fully crystallized until 1939 in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303, though it had been suggested in such earlier decisions as *Palko* v. *Connecticut, supra*, at page 324, and *Hamilton* v. *Regents*, 293 U. S. 245, 262. Only recently has the great development of this principle taken place in this Court in a series of far-reaching cases involving religious freedom in various aspects. It is now no longer possible for a state or its agencies to escape Federal constitutional limitations by reliance on construction of state statutes by state courts when they are in derogation of Federal rights now clearly recognized.[2]

In the *Cochran* case, the state court majority held that public moneys appropriated for text books given free to private, sectarian schools were not in aid of such schools, but solely for the benefit of the state or the pupils. That such schools were thus relieved of the expense of supplying their own text books and were supported by public funds to that extent and that this was merely a method of doing indirectly what could not be done directly—using public funds to aid private sectarian institutions—was entirely disregarded and this Court felt constrained to accept the state court's construction. Furthermore, the Louisiana majority justified its conclusions on the ground that the books were merely lent, not given, to the pupils and there was no segregation of the beneficiaries. It certainly cannot be claimed here that bus rides or public money paid therefor are "lent" to the sectarian school

[2] Where as here a decision of a state court involves a local matter as well as constitutional rights, a state court decision of a local question cannot control the Federal constitutional right. *Marsh* v. *Ala.*, 90 U. S. Law. Ed. (Adv. Sheets) 227, 233.

or pupils or that this School Board resolution did not segregate the beneficiaries of the aid. Accordingly we suggest that the *Cochran* case should not be regarded as controlling here.

State legislatures and school boards can devise many indirect ways and means of aiding private, sectarian schools and institutions with public moneys, particularly in communities which are predominantly of a particular sect, if they are but slightly encouraged and given an opening wedge.* Such invasions of fundamental freedoms are never made all at once or by frontal attack, but are gradual and indirect. However seemingly innocent and minor they may appear to be, this Court must be vigilant in striking them down. Such has been the Court's policy.

This Court recently has held that neither a state nor a municipality thereof, under these constitutional limitations, may impose a tax on the exercise of a religious venture designed to propagate the beliefs of a particular sect and to deprecate the beliefs of more established faiths. It said that a community may not suppress, or the state tax, the dissemination of views because they are unpopular or distasteful, and such a device would be a ready instrument for the suppression of an unpopular faith which some minority cherishes and would be a complete repudiation of the philosophy of the Bill of Rights. See *Murdock* v. *Pennsylvania, supra,* at page 116; *Jones* v. *Opelika,* 316 U. S. 584, as overruled 319 U. S. 103; *Douglas* v. *Jeannette, supra.* If a state may not levy a tax on a religious propagation venture, it logically follows that it cannot constitutionally tax the people generally and use part of such taxes to sup-

* Since the *Cochran* case decision (1930) and apparently in reliance thereon, several states have enacted legislation designed to provide text books free to private sectarian schools and several more states have passed laws authorizing the use of public funds for transporting private, sectarian school pupils.

port a venture designed to teach and propagate the beliefs and practices of a religious sect. Such a device can be made a ready instrument to aid and support propagation of particular religious beliefs, through sectarian schools well and favorably established in a local community.

This Court has held that students in public schools cannot be compelled by boards of education to participate in a civil patriotic ceremony which happens to conflict with their particular religious faith. *Gobitis* case, *supra*, as overruled by *Barnette* case, *supra*, at page 642. It follows that public financial support in aid of sectarian schools teaching that or some other religious belief is not constitutional as in violation of the principles of religious freedom embodied in the First and Fourteenth Amendments.

It has been argued that use of public funds for sectaries is justifiable because all citizens are taxed for the support of public schools. However, any parents can send their children to public schools and none can be compelled to send them there rather than to a sectarian school. The choice is free. Only a weighing of values and desired advantages is involved. Sectarian religion need not be taught in school. It can be taught and practiced freely in churches and homes. Many sincerely religious parents prefer to have their children attend the secular public schools while others see advantages in having children go to private or religious schools. Other apparent inequalities can be suggested. Childless parents are taxed to support public schools. Quakers are compelled to pay taxes for the support of a government that carries on war and administers oaths contrary to their religious beliefs. Christian Scientists are taxed to support many governmental sponsored and financed medical practices, contrary to their religious beliefs. These

are merely some of the unavoidable inequalities of treatment that necessarily occur in the maintenance of popular, democratic government; they do not suggest that the historic separation of Church and State should be abandoned.

Conclusion

This case is important and timely. It presents a situation which, however innocent or plausible it may be made to appear, constitutes a definite crack in the wall of separation between church and state. Such cracks have a tendency to widen beyond repair unless promptly sealed up.

The case arises in the field of sectarian religion where it is difficult to maintain an attitude of calm and detachment. Many decisions in the field have been decided by divided state courts. This difficulty is intensified in states and communities where particular sectarian schools are widely patronized and established. Cf. the *Adams, Wheat, Knowlton* and *Harfst* cases, *supra*. Political pressures and religious feeling and intolerance often make it difficult for local officials to act according to the philosophy of the Bill of Rights. But these difficulties were even more acute in colonial times. The ideals of religious freedom and separation of church from state which permeate our constitutions and institutions were achieved in this country only after a 150 years struggle and after what Jefferson characterized as the "severest contests in which I have ever been engaged." (Jefferson Autobiography, Vol. I, pp. 53-59.)

To deny governmental or public financial support to sectarian institutions is not to deny the efficacy of religion or religious instruction. The church and the home are free to teach religion. Recent decisions have placed religious

exercises beyond state interference. The faiths that deserve to survive will survive without state support. It has been recognized by this Court that parochial education has been "long regarded as useful and meritorious." (*Pierce v. Society of Sisters*, 268 U. S. 510, 534.) The same can be said of such education whether it is given in Catholic, Quaker, Presbyterian, Congregational, Methodist, or other sectarian schools. The problem here is merely to keep the separation clear, to avoid public support for religions so that the State may neither subsidize nor control an area wholly beyond its competency.

The constitutional policy of our country has decreed the absolute separation of church and state, not only in governmental matters but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. The Virginia Statute of Religious Freedom referred to such a practice as "sinful and tyrannical". The First Amendment was designed in part to prevent this very practice which had obtained in several of the colonies. Passage of time has not weakened but rather has emphasized the importance of preserving the constitutional barriers.

This Court aptly said in the *Barnette* case, "The first amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

We respectfully submit that the resolution and statute in question are plainly unconstitutional.

Respectfully submitted,

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